Supreme Court, U.S.
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No. 92-137

In The

Supreme Court of the United States

October Term, 1992

THE RIDGRECREST POLICE, a Municipal Law Enforcement Agency; THE CITY OF RIDGECREST, a Municipal Corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER,

Petitioners,

vs.

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW, as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW; and SANDRA CURNOW, as an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Attorney for Petitioners

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I.

REPLY TO BRIEF IN OPPOSITION

Although the reasons which warrant the grant of a writ are adequately stated in the Petition, a brief reply is warranted to correct several assertions contained in the Brief in Opposition filed by respondents.

A. Taylor's Unsigned Statement.

1. The Brief in Opposition states at page four: "Petitioners' petition concedes, at page four, the authority of a court reporter to administer oaths." (Res.Br., 4.)

This assertion is contrary to petitioners' argument and the clear language of California Code of Civil Procedure section 2093, cited in its entirety at page four of the Petition. Respondents' statement ignores a key issue of the Petition, i.e., whether the court of appeals erroneously considered the unsigned statement of Taylor for purposes of summary judgment in the absence of evidence that Coil was authorized to administer an oath or that she accurately transcribed Taylor's statements. (Pet., 17-18.)

California Code of Civil Procedure section 2093(b), states that: "Every shorthand reporter, *certified pursuant to . . . the Business and Professions Code,* has the power to administer oaths or affirmations . . . " (Pet., 4.) Contrary to respondents' characterization, Coil is not a certified court reporter; rather, Coil's statement indicates that she is a shorthand reporter. (Pet.App., C-2, C-3; Res.Br. 3-4.) Coil's statement does not indicate that Coil is a *certified*

shorthand reporter having legal authority to administer oaths and affirmations.

Petitioners argue that the decision of the Ninth Circuit to admit Taylor's unsigned statement for purposes of summary judgment is in conflict with the decisions of most, if not all, the other circuits to consider the issue. (Pet. 13-15.) Respondents claim that none of the cases cited by petitioners involve sworn witness statements. (Res.Br., 5.) Respondents' argument misses the mark because it fails to address the question of whether Taylor's statement was, in fact, "sworn" for purposes of qualifying as a Rule 56(c) affidavit. (Pet., 17-18.) More importantly, respondents fail to address whether the Ninth Circuit's holding in *In re Sunset Bay Assoc.*, 944 F.2d 1503 (9th Cir. 1991) is a valid construction of Rule 56(c).

2. The Brief in Opposition states at pages 5-6 that: "Petitioners argue that Rule 56(c) mandates the entry of summary judgment due to respondents' failure to establish that a genuine issue of material fact exists. In support of their argument, petitioners cite this Court's opinion in the case of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)." (Res.Br., 5-6.)

Petitioners discuss the *Celotex* case not in the manner urged by respondents, but to point out the Ninth Circuit's misuse of the *Celotex* decision to support its ruling in *Sunset Bay* and in this case. (Pet., 15-17.) The Ninth Circuit extracted dicta from the *Celotex* decision, that a non-moving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment, to support its ruling in *Sunset Bay* and in this case that a document is reliable where a deponent is

sworn, even though the document is unsigned. (Pet.App., A-8, A-9; *In re Sunset Bay, supra,* 944 F.2d at 1509-1510.) By misusing dicta in the *Celotex* decision, the Ninth Circuit gave an unduly broad reading to Rule 56(c) and admitted a "statement" taken in question and answer format that did not qualify as a deposition, was not signed or verified by the deponent, and was not administered by a person authorized to perform the oath ceremony. Intervention by this Court is therefore warranted to resolve the conflict between the Ninth Circuit and other courts.

B. Qualified Immunity of Officers Compton, Kruger and Bias.

1. The Brief in Opposition states at page 7 that: "The solitary basis for petitioners' position is the statement of Mercedes Taylor was not admissible." (Res.Br., 7.)

The Petition presents another question for review, i.e., whether the court of appeals erred in not granting summary judgment to three of the four named police officers involved in the case. (Pet., 19-21.) This question is presented independent of this Court's decision as to whether or not Taylor's statement was correctly admitted as a Rule 56(c) affidavit for purposes of denying petitioners' motion for summary judgment.

2. The Brief in Opposition states at page 9 that: "Petitioners fail to grasp the District Court's findings regarding two shootings of the decedent. The first shooting, subsequent to the entry to the house, has been found by this [sic] court to be reasonable." (Res.Br., 9; compare Res.Br. 11-12.)

Petitioners accept respondents' construction of the district court's ruling as an admission.[1] (*Brown v. Aguilar*, 202 Cal. 143, 194 (1927).) Accordingly, the only event that remains subject to a section 1983 challenge is the *second* shooting of the decedent as he exited the house.

The Ninth Circuit found that Officer Luarca fired both of the shots that led to the death of the decedent. (Pet.App., A-6.) As is evident from the court's statement of facts, Officers Compton and Kruger were involved only in the entry into the decedent's home. Officer Bias never entered the decedent's home nor fired any shots. (*Id.*, A-5, A-6.) Despite its acknowledgement of these facts, the Ninth Circuit neglected to consider petitioners' argument that, because Officers Compton, Bias and Kruger participated only in the initial planning and/or entry into the decedent's home and because they did not fire the shot that caused the death of the decedent, the officers are entitled to summary judgment on the basis of qualified immunity.[2]

The lack of attention to this argument by the Ninth Circuit is curious, not only because it conflicts with the decisions of courts in other districts and circuits (Pet.,

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[1] In fact, the district court analyzed two events in this case: (1) the entry into the decedent's home; and (2) the actual shooting of the decedent. (Pet.App., B-6.) The first event, the entering of the residence, was expressly found by the district court to be reasonable. (*Id.*, B-6, B-8.) As to the actual shooting of the decedent, the court held that the facts necessary for a proper determination of the issue are in dispute. (*Id.*, B-6.)

[2] Petitioners raised this issue in a Motion for Reconsideration, which was denied.

19-20), but because it fails to follow its own holding in the case of *Ting v. United States*, 927 F.2d 1504 (1991). In *Ting*, an arrestee was shot and physically injured by a federal agent standing a few feet away from the suspect, in the suspect's bedroom, immediately after an arrest. Four other officers were present in the bedroom at the time of the shooting. Plaintiff alleged that the nonshooting officers violated his constitutional rights because they did not intervene to prevent his injuries. (*Ting, supra*, 927 F.2d at 1511.)

The Ninth Circuit held that the nonshooting agents may be held liable only if they personally deprived the plaintiff of a constitutional right by failing to perform an act which they were legally required to do, which was the cause in fact of plaintiff's injuries. (*Id.*) After analyzing the evidence, the court affirmed the grant of summary judgment in favor of the nonshooting officers because: (1) there was no evidence that the four nonshooting agents knew that the shooting agent would hurt or shoot the plaintiff; (2) plaintiff failed to allege that the shooting officer had a history of using abusive force; and (3) most importantly, "the agents were positioned around the room away from [the shooting officer] and [plaintiff] and were thus physically incapable of preventing the incident surrounding the shooting, all of which transpired in a matter of seconds." The court thus determined that the agents' failure to intervene was not the "cause in fact" of plaintiff's injuries. (*Id.*)

Even if this Court concludes that Taylor's statement was properly considered by the Ninth Circuit, her statement does not present any evidence that Officers Compton, Bias, and Kruger culpably participated in the acts

that caused the decedent's death. (Pet.App., A-6, C-8; Res.Br., 11-12.) There is no evidence that Officers Bias, Kruger or Compton knew that Officer Luarca would fire his weapon other than in compliance with Compton's plan, which plan has already been held to be constitutional and proper by the district court. (Pet.App., B-6.) Moreover, respondents do not allege, nor have they presented any evidence, that Luarca had a history of using abusive force or that the nonshooting officers were aware of any such tendency. Finally, respondents do not allege, nor have they presented any evidence that the nonshooting officers could have physically prevented Officer Luarca from shooting Curnow.

The Brief in Opposition does not distinguish the cases cited in the Petition or explain how Taylor's statement creates disputed material facts regarding the use of excessive force by Officers Compton, Kruger, and Bias. (Res.Br., 10-12.) Accordingly, this court should intervene to reverse the ruling of the Ninth Circuit and the district court denying summary judgment on the basis of the qualified immunity of Officers Compton, Bias and Kruger. As stated by this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), qualified immunity "is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."

II.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

DATED: November 2, 1992

Respectfully submitted,

WAYNE LEMIEUX
Attorney for Petitioners